IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-7501

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO DISTRICT COUNTY COUNCIL OF CARPENTERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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OCTOBER TERM, 1976.

No. .....

SEARS, ROEBUCK AND CO.,
Petitioner,

vs.

SAN DIEGO DISTRICT COUNTY COUNCIL OF CARPENTERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner, Sears, Roebuck and Co., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in this case on September 2, 1976.

OPINIONS BELOW

The opinion of the California Superior Court for the County of San Diego is unreported and is reprinted as Appendix A hereto. The initial decision of the California Court of Appeal, Fourth Appellate District, is reported at 49 Cal. App. 3d 232, 122 Cal. Rptr. 449 (1975), and is reprinted as Appendix B hereto. The order of the Supreme Court of California granting hearing and retransferring the case back to the Court of Appeals is not reported and is reprinted as Appendix C hereto. The subsequent opinion of the California Court of Appeal is

reported at 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (1975), and is reprinted as Appendix D hereto. The opinion of the California Supreme Court is not as yet reported, and is reprinted as Appendix E hereto.

JURISDICTION

The opinion and judgment of the Supreme Court of California (App. E) both issued on September 2, 1976. This judgment is final for purposes of review by this Court. *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 551-52 (1944). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED

Are state courts preempted by the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, from determining whether the unauthorized entry of union pickets on private property constitutes a trespass.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.* (hereafter "the Labor Act") and the California Penal Code, Calif. Code Ann. § 602, are reprinted as Appendix F hereto.

STATEMENT OF THE CASE

Sears, Roebuck and Co. (hereafter "Sears") owns and operates a retail department store in Chula Vista, California. The store building itself is centered on a large rectangular-shaped piece of land and is the only store on the premises. Walkways abut the building on all four sides, and these in turn are surrounded by a large parking area except on one side which is bounded by a blockwall fence that separates private dwellings from the store

property. This property is posted against use by other than Sears' customers and against solicitation, distribution of handbills or other activity by nonemployees. The Sears' property is surrounded by a wide public sidewalk, as well as curbs at the street, where anyone walking is in full view of those persons entering the Sears' store.

On October 26, 1973, the San Diego County District Council of Carpenters (hereafter "the Union") established a picket line on the private walkway adjacent to the store to protest the fact that Sears was having carpentry work performed by carpenters who had not been dispatched from the Union's hiring hall. Sears notified the pickets that they were on private property and requested that they leave the property immediately. The pickets did leave, but returned a short time later.

When it became apparent that the pickets would not leave voluntarily, Sears sought an injunction in the San Diego County Superior Court. After argument, the Court issued a temporary restraining order on October 29, 1973, and a preliminary injunction on November 21, 1973, enjoining the Union, its agents, representatives and members from picketing on Sears' property. Both orders, however, expressly permitted picketing on the adjacent public property. App. A, pp. A2 and A3. There was no evidence introduced to demonstrate either that picketing at these public locations would be ineffective or that other alternative means of communication were not available to the Union.

An appeal was taken and the California Court of Appeal twice affirmed the issuance of the injunction. App. B. and D. The California Supreme Court, however, reversed. It held that "federal law preempts both state and federal court jurisdiction of the controversy at hand, that such law confers exclusive jurisdiction on the National Labor Relations Board . . . and that to such rule of preemption there is no exception permitting state courts to exercise jurisdiction over peaceful labor activity merely because it involves trespass on private property." App. E, p. A33. The decision noted that this Court had left open

this question (App. E, pp. A40-41); that Chief Justice Burger had expressed a different view in *Taggart* v. *Weinacker's*, 397 U. S. 223, 227 (concurring opinion) (App. E, p. A43); that other Justices had also expressed concern about the hiatus created by a finding of preemption (App. E, p. 44, n. 7); and that the highest courts of other states had reached a contrary position (App. E, p. A46). The California Supreme Court nevertheless concluded that it was bound by this Court's "most recent ruling . . . the holding in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), which precludes state court jurisdiction over the labor dispute before us. Notwithstanding the views of individual members of the high court, the . . . court itself has not to date created a judicial exception to its *Garmon* ruling so as to except from it [the trespassory activities here at issue]." App. E, p. A44.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Raises an Important Question Which Has Not Been, But Should Be, Settled by This Court

Review should be granted in order to resolve a substantial, recurrent question not heretofore decided by this Court, *viz.*, whether, under *Garmon*, state courts retain jurisdiction to declare a trespass by union pickets on private property to be violative of state law.

This Court expressly left this question open in *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U. S. 20, 24-25 (1957). It has not thereafter decided the matter notwithstanding that certiorari has twice been granted on the very same question as that presented here: *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza*, 391 U. S. 308 (1968); *Taggart* v. *Weinacker's, supra*. In *Logan Valley*, the Court did not reach the preemption question (391 U. S. at 309, n. 1; see also the dissenting opinion by Mr. Justice Harlan, 391 U. S. at 333) and the issue was similarly left undecided in

Taggart when the writ of certiorari there was dismissed as improvidently granted. 397 U. S. at 226. However, in a concurring opinion in *Taggart*, Chief Justice Burger commented that, in his opinion, contrary to the decision of the California Supreme Court in this case:

> "[A]ny contention that the States are preempted is without merit. . . . Nothing in [*Garmon*] . . . would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desire redress for illegal trespassory picketing. . . . A holding that Congress preempted this entire area is as inappropriate here as it was in *Linn* [v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966)], and for precisely the same reasons. Cf. *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. at 201, 25 L.Ed. 2d at 223 (White J., concurring)."

397 U. S. at 227-29. Mr. Justice Harlan's separate memorandum in *Taggart* disagreed with the Chief Justice's views, as well as the opinion of Mr. Justice White (joined by The Chief Justice and Mr. Justice Stewart) in *Ariadne*, for essentially the same reasons as those relied on by the court below. 397 U. S. at 229-231.

The instant case presents this Court with an appropriate vehicle to resolve this undecided question. A failure to decide the issue, on the other hand, would perpetuate a number of undesirable results: (1) the present uncertainty and conflict as to whether the states have jurisdiction in the instant circumstances to enforce their trespass laws, as shown by the following section, will continue with the consequence that the rights of unions and employers will vary from state to state; (2) states, such as California, which have concluded that their jurisdiction is preempted, will be unable to protect a "deeply rooted" state interest which is of only "peripheral concern" to the Labor Act—the protection of private property rights from trespass (*Taggart*, 397 U. S. at 227-229 (Burger, C. J., concurring)); and (3) property owners will have to rely solely on self-help to protect

their property from trespass, a situation which will "[create] disrespect for the law and [encourage] the victim to take matters into his own hands." *Linn*, 383 U. S. at 64, n. 6.

B. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the States

One of the reasons this Court granted certiorari in *Linn* was to resolve a similar preemption conflict, *i.e.*, the extent to which the Labor Act preempted state libel action jurisdiction, because "[t]he question . . . has been a recurring one in both state and federal tribunals." 383 U. S. at 57 (footnote omitted). For apparently the same reason, related preemption issues have frequently been determined by this Court in recent years.[1] The question presented in this case is of the same magnitude. The extent to which the Labor Act supercedes the jurisdiction of state courts to protect their constitutents' private property from trespass has been a recurrent question whose resolution has varied from state to state.

In diametic conflict with the decision below, the courts of many states have asserted jurisdiction, notwithstanding *Garmon*, to decide whether union pickets have trespassed on private property in violation of state law.[2] In fact, in just the last year,

1. See *e.g.*, *Hill* v. *Carpenters Union*, Case No. 75-804, *cert. granted* 44 U. S. L. W. 3427 (1976); *Machinists & Aerospace Workers* v. *WERC*, Case No. 75-185, ... U. S. ...., 92 LRRM 2881 (1976); *Connell Construction Company, Inc.* v. *Plumbers Union No. 100*, 421 U. S. 616 (1975); and *Amalgamated Assn. of Street, Electric Railway and Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971).

2. See, *e.g.*, *People* v. *Goduto*, 21 Ill. 2d 605, 174 N. E. 2d 385, *cert. den.*, 368 U. S. 927 (1961), where the Illinois Supreme Court enjoined picketing on a private parking lot; *Marriott Corp.* v. *Rosado*, 70 Misc. 2d 423, 333 N. Y. S. 2d 114 (1972), *aff'd*, 353 N. Y. S. 2d 924 (App. Div. 1974), where union picketing at various terminal buildings at Kennedy and LaGuardia Airports was enjoined; *Jack Loeks Enterprises* v. *Local 291*, 87 LRRM 3105 (No. 74 16697 CZ (Mich. Cir. Ct., Kent County, November 15, 1974), where a preliminary injunction was issued to re-

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the highest courts of both New York and Illinois have refused to preempt a state court jurisdiction where union trespassory activities were at issue. In *May Department Stores, et al.* v. *Teamsters Union Local No. 743*, 64 Ill. 2d 153, 163, 355 N. E. 2d 7, 11 (Sept. 20, 1976), decided only a few days after the decision in the instant case, the Illinois Supreme Court reaffirmed its position that "under the *Garmon* doctrine the states are not preempted from jurisdiction of a trespass action" where nonemployee union organizers solicited employees and distributed literature on a company-owned parking lot. Similarly, the New York Court of Appeals in *People* v. *Bush*, 39 N. Y. 2d 529, 349 N. E. 2d 832, 838 (May 4, 1976), held that union picketing on private property could be enjoined under state law because the union "deliberately placed itself in conflict with the exercise of the state's police powers."

Other state courts, however, like the California Supreme Court in the present case, have reached an opposite result and considered their jurisdiction preempted as a result of *Garmon*.[3]

The absence of a definite decision by this Court has thus occasioned conflicting state interpretations of federal law. The

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strain union picketing on the "parking lot, sidewalk, theatre building, or other associated areas" of a shopping center tenant; *Moreland Corp.* v. *Retail Store Employees Union*, 16 Wisc. 2d 499, 114 N. W. 2d 876 (1962), where the Wisconsin Supreme Court upheld an injunction prohibiting union members from picketing on the private property of a shopping center; and *Hood* v. *Stafford*, 213 Tenn. 684, 378 S. W. 2d 766 (1964), where the Tennessee Supreme Court concluded that it had jurisdiction to enforce against union pickets a state statute which proscribed entering a business or standing outside it for the purpose of enticing anyone therefrom.

3. See, *e.g.*, *Hudgens* v. *Local 315, Retail, Wholesale and Dept. Store Union, AFL-CIO*, 231 Ga. 669, 203 S. E. 2d 478 (1974), *cert. den.*, 96 S. Ct. 1435 (1976), where the court similarly ruled that preemption applied; *Freeman* v. *Retail Clerks Union Local No. 1207*, 58 Wash. 2d 426, 363 P. 2d 803 (1961), where the Supreme Court of Washington held that, since an action for trespass by a shopping center owner against a labor union was an "arguable subject" of the Labor Act, the court did not have subject matter jurisdiction; *United Maintenance Co.* v.

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continued existence of such different rules on an important issue of labor-management relations impairs the desired uniformity of national labor policy. Review by this Court is warranted, therefore, to provide guidance to the states and to "spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner* v. *Teamsters Union*, 346 U. S. 485, 488 (1953).

C. The Court Below Misconstrued the Decisions of This Court

The court below misconstrued *Garmon*. That case expressly recognized that state jurisdiction is unimpaired where the activity involved—as in the case of trespass—is ". . . a merely peripheral concern of the Labor Management Relations Act . . . or where the regulated conduct touches interests . . . deeply rooted in local feeling and responsibility . . ." 359 U. S. at 243-244. See also *Vaca* v. *Sipes*, 386 U. S. 171, 180 (1967), and the cases cited therein.

In the present controversy, the union picketing did not meet the basic *Garmon* test and, in addition, was encompassed by the exceptions thereto. *First*, unauthorized picketing on private property does not fall within either the proscription or protection of the Labor Act. As the Chief Justice observed in his concurring opinion in *Taggart*, "Congress . . . has provided no remedy to an employer within the National Labor Relations Act to prevent an illegal trespass on his premises." 397 U. S. at 227.[4] This unavailability of a remedy "vitiates the ordinary

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Steelworkers, 86 LRRM 2364 (No. 13405, West Va. Ct. App., 1974); where the court held that it lacked jurisdiction to enjoin a trespass; and *Hennerin Broadcasting Associates* v. *AFTRA*, 84 LRRM 2217 (No. 696356, Minn. Dist. Ct. 4th Dist., 1973), where the court denied a motion for a temporary order restraining union picketing on or near a radio station's premises on the ground that its jurisdiction was preempted.

4. See, *e.g.*, *Organizing and the Law, A Handbook for Union Organizers*, by Stephen I. Schlossberg, General Counsel, United

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arguments for preemption." *Linn* v. *United Plant Guard Workers, Local 114, supra.* Indeed, the Labor Board's own Assistant General Counsel has recognized that an "[a]pplication of the *Garmon* 'arguably protected' test in this situation leaves the employer's interest in an unsatisfactory condition. . . . The result is an undesirable as the 'no-man's land' created by the holding in *Guss* [v. *Utah Labor Relations Board*, 353 U. S. 1 (1957)]. . . ." Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 Va. L. Rev. 1435, 1444 (1971). See also Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1363 (1972); and Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 Harv. L. Rev. 552, 558, 567 (1970).

Second, as this Court's decision in *Lloyd Corporation* v. *Tanner*, 407 U. S. 551, 557, 570 (1972), makes clear, "the Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected." These constitutional rights would be violated if the pickets are left free to continue their activities on Sears' property. See *Lenrich Associates* v. *Heydra*, 504 P. 2d 112 (Or., 1972). Failing to provide the property owner with a remedy in the circumstances of this case thus effects a deprivation of property without due process and just compensation. The situation is no different than that which would be occasioned if a state took affirmative action

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Automobile, Aerospace and Agricultural Implement Workers of America (UAW), 1967, at p. 40:

> "If a professional organizer hands out union literature on the ordinary employer's property over the employer's objection in the absence of the exceptional circumstances mentioned above, *he does so without the protection of the Labor Act.* The employer does not violate the law by posting his property. He is permitted to call the police to cause an arrest for trespassing, and finally he can, by self-help, use reasonable means to eject the organizer from the property. *There is, however, no section of the Taft-Hartley Act available to the employer in this situation.*" (emphasis added.)

through legislation to provide pickets with access to private property where other reasonable alternatives were available.

Finally, union trespass on private property, while only a peripheral concern of the Labor Act, is a matter deeply rooted in local concern. The California Court of Appeals in the present case, for example, declared that "[t]he values of real property and one's right to peaceful possession and control over it, though certainly not absolute, are basic in our state and are deeply rooted in local feeling and responsibility . . . Our courts consistentiy have provided a forum for the preservation of such values. . . ." App. D, p. A20. Chief Justice Burger similarly observed in *Taggart* that "the protection of private property . . . through trespass laws is historically a concern of state law." 397 U. S. at 227. There is, after all, an "overriding state interest . . . involved in the maintenance of domestic peace" (*Local 100, Association of Journeymen and Apprentices* v. *Borden*, 373 U. S. 690, 693 (1963)), and the basic purpose of trespass statutes is "the prevention of violence or threats of violence". *People* v. *Goduto*, 174 N. E. 2d at 387. The state courts are peculiarly equipped, without impinging upon federal labor policy, to regulate trespassory activity. Moreover, the Board can provide relief to the picketing union, if it deserves it, by either enjoining an improper order of a state court (see *N. L. R. B.* v. *Nash-Finch Co.*, 404 U. S. 138 (1971)), and/or by acting directly against the property owner seeking to exclude the union pickets. Cf. *Hudgens* v. *N. L. R. B.*, 424 U. S. 507 (1976); *Central Hardware Company* v. *N. L. R. B.*, 407 U. S. 539 (1972). During Board consideration of the dispute, however, the *status quo* is maintained and respect for the law preserved. *May Department Stores* v. *Teamsters Union Local 743, supra.*

The California courts thus should have concurrent jurisdiction, alongside the Labor Board, where there is unauthorized union entry on private property. This is not an unusual situation in labor law. The states and the Labor Board have concurrent authority in cases involving libel (*Linn* v. *Plant Guards, supra*),

breach of a union's duty of fair representation (*Vaca* v. *Sipes, supra*), picketing where there has been violence or threats of violence (*United Auto Workers* v. *W. E. R. B.*, 351 U. S. 266 (1956)), and as well as in other areas. See *Machinists & Aerospace Workers* v. *WERC*, ... U. S. at ....., 92 LRRM at 2882-2883, ns. 2 and 3. All of these situations, like trespass, involve areas of traditional state concern regulated by a state law of general application. In such cases, Congress did not deprive the states of their power to act; the Labor Act expressly "left much to the states" (*Garmon*, 359 U. S. at 240), including the right of the states to uniformly enforce their trespass laws.

CONCLUSION

For all the foregoing reasons, Sears, Roebuck and Co. respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
In and For the County of San Diego

SEARS ROEBUCK & COMPANY,
Plaintiff,
vs.
SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, and DOES I through 100,
Defendants.

No. 347511

ORDER GRANTING PRELIMINARY INJUNCTION

The above matter came on regularly for hearing on November 16, 1973 in Department 6 of the above entitled Court pursuant to an order to show cause why a preliminary injunction should not issue. Gray, Cary, Ames & Frye, by David B. Geerdes, appeared as counsel for plaintiff, and Brundage, Williams & Zellmann, by Thomas B. Manning, appeared as counsel for defendant, San Diego County District Council of Carpenters.

On proof being made to the satisfaction of the Court, and good cause appearing therefore;

It Is Hereby Ordered that during the pendency of this action, or until the final determination thereof, or until the Court shall otherwise order, defendant, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, and their attorneys, shall be, and hereby are enjoined and restrained from causing, instigating, furthering, participating

in, or carrying on picketing on the plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, "H" Street and "I" Street in Chula Vista, California; this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, "H" Street and "I" Street which are adjacent to the private property of plaintiff.

It is further ordered that a preliminary injunction be issued as hereinabove set forth, upon plaintiff's filing and undertaking in due form, to be approved by this Court, in the sum of $1,000.00.

Dated this 21 day of November, 1973.

/s/ JOSEPH A. KILGARIF,
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
In and For the County of San Diego

SEARS ROEBUCK & COMPANY, *Plaintiff,* *vs.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, and DOES 1 through 100, *Defendants.*	No. 347511

PRELIMINARY INJUNCTION

Pursuant to this Court's order granting a preliminary injunction, and the plaintiff's filing an undertaking approved by this Court in the sum of $1,000.00;

It Is Hereby Ordered that during the pendency of this action, or until the final determination thereof, or until the Court shall otherwise order, defendants, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, and their attorneys, shall be, and hereby are enjoined and restrained from causing, instigating, furthering, participating in, or carrying on picketing on the plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, "H" Street and "I" Street in Chula Vista, California; this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, "H" Street and "I" Street which are adjacent to the private property of plaintiff.

Dated this 21 day of November, 1973.

/s/ JOSEPH A. KILGARIF,
Judge of the Superior Court

APPENDIX B

Certified for Publication

IN THE COURT OF APPEALS, FOURTH APPELLATE DISTRICT

Division One

State of California

SEARS ROEBUCK & COMPANY,
Plaintiff and Respondent,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,
Defendant and Appellant.

4 Civ. No. 14036
(Sup. Ct. No. 347511)

OPINION

Appeal from a judgment of the Superior Court of San Diego County. Joseph A. Kilgarif, Judge. Affirmed.

Brundage, Williams & Zellmann, and Jerry J. Williams, for Defendant and Appellant.

Gray, Cary, Ames & Frye, and David B. Geerdes, for Plaintiff and Respondent.

Sears Roebuck & Company (Sears) filed a complaint against the San Diego County District Council of Carpenters (Union) for an injunction (continuing trespass), and secured a temporary restraining order. The demurrer to the complaint was overruled and the issue set for hearing as a short cause on November 16, 1973. The preliminary injunction was granted on November 21, 1973, and the Union appeals.

In October 1973 the Union was informed by one of its members that Sears was performing certain carpentry work

in the store located at 555-5th Avenue in Chula Vista. Business agents of the Union visited the store and determined certain platforms and wooden structures were being constructed by persons who had not been dispatched from their hiring halls. The work was that which would be required of a "journeyman carpenter."

The Union agents called upon J. L. Ochoa, the store manager, and asked him to contract the work through a Union contractor or sign a short form agreement relative to use of Union carpenters and at prevailing Union wage scale. Ochoa advised the agents he would look into the matter but never reported back even though they made repeated attempts to reach him.

On the morning of October 26, 1973, the Union began picketing the store, walking back and forth in the parking lot next to the walkways on the north, west and east sides of the building. The pickets were peaceful, did not interfere with traffic and generally conducted their work without violence or threat of violence.

The Sears building is located 220 feet from 5th Avenue, 288 feet from H Street and 490 feet from I Street and is the only business at the location. The building is surrounded with a sidewalk and beyond that a parking area. The entire Sears location is surrounded with a city-owned sidewalk and curb at the street. The general public, of course, has access to the entire area. The restraining order required the pickets to keep off of the Sears-owned property, confining their pickets to the public sidewalks at the curb line of the public streets. Other Union sympathizers saw the pickets and refused to cross the lines but the Union contends the pickets are, in that position, out of view of the shopping public and are less effective. Since November 12, 1973, there have been no pickets at the Sears Chula Vista store.

The Union first contends the state courts have no jurisdiction in this sort of labor-management dispute and that both state and

federal courts must defer to the exclusive juirsdiction of the National Labor Relations Board.

State regulation of peaceful picketing[1] is subject to two principal limitations: (1) the free speech guaranty of the First Amendment; and (2) preemption of the field of regulation by the National Labor Relations Act (Act).[2] Under the Act the National Labor Relations Board (NLRB) may issue a cease and desist order or seek injunctive relief if it determines an unfair labor practice has occurred.[3] While neither the Act nor its legislative history provides for a preemption in the field of labor relations, the courts have held the NLRB has primary responsibility for dealing with the problem. In *Garner* v. *Teamsters, Chauffeurs and Helpers, Etc.* (1953), 346 U. S. 485, 490-491 [74 S. Ct. 161, 165-166], the United States Supreme Court said:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. Indeed, Pennsylvania passed a statute the same year as its labor relations Act reciting abuses of the injunction in labor litigations attributable more to procedure and usage than to substantive rules. A multiplicity of tribunals and a diversity of procedures are

1. See generally 56 Virginia L. R. 1435, 83 Harvard L. R. 552.

2. 29 U. S. C. A. Section 151 et seq. The National Labor Relations Act (NLRA) is encompassed in the Labor Management Relations Act (29 U. S. C. A. Section 141 et seq.).

3. See generally 83 Harvard Law Review 552, 554 et seq.

> quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so."

Total preemption, however, has yielded to some exceptions which the same court defined in *San Diego Building Trades Council, Etc.* v. *Garmon* (1959), 359 U. S. 236 [79 S. Ct. 773]. In that case the court states the rule to be when an activity is arguably protected under section 7 or arguably prohibited under section 8 of the Act,[4] the state as well as the federal courts must defer to the exclusive primary competence of the National Labor Relations Board,[5] but it carved two notable exceptions into the rule precluding state action. These are (1) where the activity regulated was a merely peripheral concern of the Act, or (2) where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not infer Congress had deprived the states of the power to act. In the former category was subject matter suggested by *International Ass'n of Machinists* v. *Gonzales* (1958), 356 U. S. 617 [78 S. St. 923] which dealt with contractual rights between unions and their members, a matter not really affecting management (but cf. *Amalgamated Ass'n of St., E. R. & M. C. Emp.* v. *Lockridge* (1971), 403 U. S. 274, 292-297 [91 S. Ct. 1909, 1920-1923]). In the second category the *Garmon* court pointed to *International Union, Etc.* v. *Russell* (1958), 356 U. S. 634 [78 S. Ct. 932], dealing with intimidation and threats of violence (see also *Linn* v. *United Plant Guard Wkrs. of Amer., Loc. 114* (1966), 383 U. S. 53 [86 S. Ct. 657], dealing with malicious defamation during a labor dispute).

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The United States Supreme Court has not yet accepted a case where it could directly address the narrow question of the states' right to enjoin a trespass as it may be involved in labor disputes. In *Amalgamated Meat Cut., Etc.* v. *Fairlawn Meats* (1957), 353 U. S. 20, 24 [77 S. Ct. 604, 606], the court expressly reserved the question. Since *Fairlawn Meats*, the high courts of Alabama,[6] Illinois,[7] Tennessee,[8] and Wisconsin[9] have decided cases which hold the state does have subject matter jurisdiction in cases of trespass. The Supreme Court specifically refused to grant certiorari in the Illinois case. In the Alabama case certiorari was granted and later dismissed as improvidently granted since "only a bare remnant of the original controversy remains." In that case, however, Chief Justice Burger in a concurring opinion stated:

> "In my view any contention that the States are pre-empted in these circumstances is without merit. The protection of private property, whether a home, factory, or store, through trespass laws is historically a concern of state law. Congress has never undertaken to alter this allocation of power, and has provided no remedy to an employer within the National Labor Relations Act (NLRA) to prevent an illegal trespass on his premises. Rather, it has acted against the backdrop of the general application of state trespass laws to provide certain protections to employees through § 7 of the NLRA, 61 Stat. 140, 29 U.S.C. § 157. A holding that the States were precluded from acting would remove the backdrop of state law that provided the basis of congressional action but would leave intact the narrower restraint present in federal law through § 7 and would thereby artificially *create* a no-law area.

6. *Taggart* v. *Weinacker's, Inc.* (1968), 283 Ala. 171 [214 So. 2d 913, 917-918, 921], *cert. denied* (1969), 396 U. S. 813 [90 S. Ct. 52], *cert. dismissed* (1970), 397 U. S. 223 [90 S. Ct. 876].

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9. *Moreland Corp.* v. *Retail Store Employees Union Local No. 444* (1962), 16 Wis. 2d 499, 503 [114 N. W. 2d 876, 878].

> "Nothing in *San Diego Building Trades Council, Millmen's Union, Local 2020* v. *Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desires redress for illegal trespassory picketing. *Garmon* left to the States the power to regulate any matter of 'peripheral concern' to the NLRA or that conduct that touches interests 'deeply rooted in local feeling and responsibility.' (359 U.S., at 243, 244, 79 S.Ct., at 779.) Few concepts are more 'deeply rooted' than the power of a State to protect the rights of its citizens." (*Taggart* v. *Weinacker's, Inc.* (1970), *supra*, 397 U. S. 223, 227-228 [90 S. Ct. 876, 878].)

In *Linn* v. *United Plant Guard Wkrs. of Amer., Loc. 114* (1966), *supra*, 383 U. S. 53 [86 S. Ct. 657], the Supreme Court held the NLRB did not have exclusive jurisdiction in a suit by the employer against the Union for malicious defamation in connection with a labor dispute. The court concluded, "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon*." (383 U. S. at 62 [86 S. Ct. at 663]; see also *Old Dominion Br. No. 496, Nat. Ass'n. Letter Car.* v. *Austin* (1974), 418 U. S. 264, ... [94 S. Ct. 2770, 2775]. We believe the rule applies equally to trespass.[10] The value of property and one's right to peaceful possession is basic in our state and that value is deeply rooted in local feeling and responsibility (see, e.g., Pen. Code §§ 552 et seq., 602, 602.5, 603 and 647c). While not essential to the application of the *Garmon* rule it is proper to note this action in the state court does not directly infringe on the jurisdiction of the NLRB, for no effort was made to bring the matter within the Board's jurisdiction.[11] The California courts

10. In *Taggart* v. *Weinacker's, Inc.* (1970), *supra*, 397 U. S. 223, 229-231 [90 S. Ct. 876, 879-880], Justice Harlan, however, distinguished *Linn* on the grounds that "malicious libel" is not arguably protected by the Act, and trespass must be put within the purview of the NLRB authority.

11. See Justice Harlan's memorandum opinion in *Taggart* v. *Weinacker's Inc.* (1970), *supra*, 397 U. S. 223, 230 [90 S. Ct. 876,

(Continued on next page)

are not preempted from exercising their general jurisdiction in matters of trespass related to labor disputes.

The Union next contends the First Amendment to the United States Constitution guarantees the right to picket Sears premises. It relies generally on *Amal. Food Emp. U. Loc. 590* v. *Logan Valley Plaza* (1968), 391 U. S. 308, 313 [88 S. Ct. 1601, 1605], and a line of cited cases holding peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of picketing, protected by the First Amendment. The fact that the property upon which the picketing occurs is private does not necessarily preclude asserting the constitutional right of free speech if the property is treated as public property (*Marsh* v. *State of Alabama* (1946), 326 U. S. 501 [66 S. Ct. 276]).[12] In *Logan Valley Plaza* the court held a shopping center complex with numerous tenants and streets and walkways had sufficient characteristics of a public municipal facility to permit picketing directly related in its purpose to the use to which the shopping center property was being put.[13]

(Continued from preceding page)

879], in which the Justice recognizes concern over the hiatus created when the NLRB does not or cannot assert its jurisdiction and the "arguably protected" rule of the *Garmon* case leaves the employer in the position of using self-help or provoking the union to charge the employer with an unfair labor practice (see also Justice White's concurring opinion in *International Longshore, Local 1416* v. *Ariadne Shipping Co.* (1970), 397 U. S. 195, 201-202 [90 S. Ct. 872, 875]. The problem is also discussed in 56 Virginia Law Review 1435, 1437-1438.

12. In *Marsh* v. *State of Alabama* (1946), *supra*, 326 U. S. 501 [66 S. Ct. 276], the Jehovah's Witnesses were allowed to distribute religious literature on the streets of a "company town" because the property, though privately owned by Gulf Shipbuilding Corporation, had all the outward appearances of any other town including streets and walkways open to the public with nothing to distinguish them as private property. The owner also assumed the functions of a municipal government.

13. *In re Lane* (1969), 71 Cal. 2d 872, follows the *Logan Valley Plaza* holding. It was not a labor management dispute with the picketed store but rather the picketer was protecting the store's ad-

(Continued on next page)

After the decision in *Logan Valley Plaza*, however, its apparently broad holding as to the scope of the constitutional right to exercise First and Fourteenth Amendment rights on property generally open to the public has been somewhat limited as it applies to privately-owned property. In *Lloyd Corporation, Ltd.* v. *Tanner* (1972), 407 U. S. 551, 562 [92 S. Ct. 2219, 2225], the court points out that *Logan Valley Plaza* extended the *Marsh* rule to a shopping center complex only in the context where the picketing activity directly related to the shopping center activities "*and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available.*" (Emphasis added.) (*Lloyd Corporation, Ltd.* v. *Tanner* (1972), *supra*, 407 U. S. 551, 563 [92 S. Ct. 2219, 2226].) In denying the respondents the right to pass out handbills (not a labor management dispute) the court rejected the argument that since the center is open to the public, the private owner cannot enforce restrictions against handbills on the premises. It stated such an argument misapprehends the scope of the invitation extended to the public which is to come to the center to do business.

On the heels of this decision was *Central Hardware Company* v. *N. L. R. B.* (1972), 407 U. S. 539 [92 S. Ct. 2238], a case which did involve a union dispute. Here the Supreme Court reiterated the limitation on the *Logan Valley Plaza* case, saying:

> "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.

(Continued from preceding page)

vertising in a newspaper engaged in a union dispute. It did, however, involve a single store with parking lot much as is present in Sears case. The court balanced the interests and, finding the public sidewalk hazardous, upheld the right to picket on private property.

> The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are 'open to the public.' Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." (*Central Hardware Company* v. *N. L. R. B.* (1972), *supra*, 407 U. S. at 547 [92 S. Ct. at 2243].)

The facts in the instant case, like those in *Central Hardware*, did not provide the court with adequate reasons for turning its back on the rights of the property owner. As in *Central Hardware*, we do not have a shopping center complex but a privately operated single store. The Union's right to picket was not denied nor was there an unreasonable restriction on its right to communicate with the general public. The position of the pickets on the sidewalk was not any more hazardous[14] and was just as effective. Union sympathizers did see and honor the lines. There was no showing any confusion existed as to the object of the Union's attack since the pickets at the parking lot entrance could communicate with all the persons dealing with Sears whose patrons were the only ones using the parking lot. We find the *Central Hardware* case to be controlling. There is

14. The case before us differs substantially from *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers' Union* (1964), 61 Cal. 2d 766, relied on by the Union, in that the picketing on nearby public streets or sidewalks would entail the danger of traffic tie-up confusion as to the object of the picketing, and would impose the requirements of larger signs and more pickets. *Schwartz-Torrance* involved a shopping center complex and the principal target of the picketing was a single store within the complex. The court balanced the respective rights of the private property owner and the Union, and concluded the Union's interest in picketing outweighed a theoretical invasion of the right to exclusive control by the shopping center owner. See also *In re Lane* (1969), *supra*, 71 Cal. 2d 872, 877, where "difficulties and hazards" to those exercising their First Amendment privileges existed (but *cf. Central Hardware Company* v. *N. L. R. B.* (1972), *supra*, 407 U. S. 539, 547 [92 S. Ct. 2238, 2243] and *N. L. R. B.* v. *Babcock & Wilcox Co.* (1956), 351 U. S. 105, 112 [76 S. Ct. 679, 684]).

nothing in the facts presented here to suggest in the balancing of respective interests the interest of the property owner *must* yield to the Union. (See also *Diamond* v. *Bland* (1974), 11 Cal. 3d 331, 334.)

The Union finally contends California law proscribes the issuance of injunctions for Union activity, relying on *Petri Cleaners, Inc.* v. *Automotive Employees, etc., Local No. 88* (1960), 53 Cal. 2d 455, and *Messner* v. *Journeymen Barbers etc. International Union* (1960), 53 Cal. 2d 873. No one disputes the right of the Union to employ picketing reasonably related to lawful objectives but neither of the cases cited involves the issue of Union activity on private property. Nor is Penal Code section 552.1[15] which is applicable only to posted industrial property,[16] a proscription on the issuance of an injunction in this case which involves commercial property used for retail sales.

Judgment affirmed.

Certified for Publication. /s/ COLOGNE

We Concur:

/s/ BROWN
P.J.

/s/ COUGHLIN
J.•

15. Penal Code section 552.1 reads in part as follows:

This article does not prohibit:

"(a) Any lawful activity for the purpose of engaging in any organizational effort on behalf of any labor union, agent, or member thereof, or of any employee group, or any member thereof, employed or formerly employed in any place of business or manufacturing establishment described in this article, or for the purpose of carrying on the lawful activities of labor unions, or members thereof."

16. Article 1 preceding Penal Code section 552.1 is entitled Trespassing or Loitering near Posted Industrial Property, and the property subject of the article is defined in section 554 as including property used in petroleum, gas, electricity, telephone, water, explosive or rail facilities. (See also *Cotton* v. *Superior Court* (1961), 56 Cal. 2d 459, 463.)

• Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

SEARS ROEBUCK AND COMPANY

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS

Petition for hearing Granted and cause transferred to this court and retransferred to the Court of Appeal, Fourth District, Division One.

/s/ WRIGHT
Chief Justice

/s/ CLARK
Justice

/s/ TOBRINER
Justice

/s/ MOSK
Justice

/s/ SULLIVAN
Justice

/s/ RICHARDSON
Justice

.....
Justice

APPENDIX D

Certified for Publication

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

Division One

State of California

SEARS ROEBUCK & COMPANY, *Plaintiff and Respondent,* *vs.* SAN DIEGO COUNTY DISTRICT COUNSEL OF CARPENTERS, *Defendant and Appellant.*	4 Civ. No. 14036 (Sup. Ct. No. 347511)

OPINION

Appeal from a judgment of the Superior Court of San Diego County. Joseph A. Kilgarif, Judge. Affirmed.

Brundage, Williams & Zellmann, and Jerry J. Williams, for Defendant and Appellant.

Gray, Cary, Ames & Frye, and David B. Geerdes, for Plaintiff and Respondent.

Sears Roebuck & Company (Sears) filed a complaint against the San Diego County District Council of Carpenters (Union) for an injunction (continuing trespass), and secured a temporary restraining order. The demurrer to the complaint was overruled and the issue set for hearing as a short cause on November 16, 1973. The preliminary injunction was granted on November 21, 1973, and the Union appeals.

In October 1973 the Union was informed by one of its members that Sears was performing certain carpentry work in the

store located at 555-5th Avenue in Chula Vista. Business agents of the Union visited the store and determined certain platforms and wooden structures were being constructed by persons who had not been dispatched from their hiring halls. The work was that which would be required of a "journeyman carpenter."

The Union agents called upon J. L. Ochoa, the store manager, and asked him to contract the work through a Union contractor or sign a short form agreement realative to use of Union carpenters and at prevailing Union wage scale. Ochoa advised the agents he would look into the matter but never reported back even though they made repeated attempts to reach him.

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The Union first contends the state courts have no jurisdiction in this sort of labor-management dispute and that both state and federal courts must defer to the exclusive jurisdiction of the National Labor Relations Board (NLRB).

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2. 29 U. S. C. A. section 151 et seq. The National Labor Relations Act (NLRA) is encompassed in the Labor Management Relations Act (29 U. S. C. A. section 141 et seq.).

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> "Nothing in *San Diego Building Trades Council, Millmen's Union, Local 2020* v. *Garmon*, 359 U.S. 236, 79 S.Ct. 773,

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10. In *Taggart* v. *Weinacker's Inc., supra,* 397 U. S. 223, 229-231 [90 S. Ct. 876, 879-880], Justice Harlan, however, distinguished *Linn* on the grounds that "malicious libel" is not arguably protected by the Act, and trespass must be put within the purview of the NLRB authority.

In *Central Hardware Company* v. *N. L. R. B.* (1972), 407 U. S. 539 [92 S. Ct. 2238], the United States Supreme Court considered a case involving a private property owner's exercise of traditional possessory interest rights through resort to trespass law and the simultaneous exercise of union organizational rights protected under section 7 of the Act on the landowner's property open to the public. The landowner was beginning operation of two retail stores each surrounded on three sides by a parking lot, essentially the same as the Sears store involved here. The union sought to organize the stores' clerks by means of soliciting in the stores' parking lots which were maintained solely for use by customers and employees. Police arrested a union field organizer after he persistently refused the store manager's request to leave. Then, through an unfair labor practices complaint, the union obtained an order from the NLRB preventing the stores' management from enforcing any rule prohibiting union organizers from using the parking lots to solicit employees on behalf of the union. The NLRB order necessarily included within its scope the use of arrest under any trespass law to keep the union organizers off of the property. The Court of Appeals affirmed the NLRB order. The Supreme Court considered the problem of accommodation between traditional concepts of private property and union organization rights under section 7 of the Act. The court gave effect to the property owner's right of control over his property through enforcement of trespass laws when it concluded the fact the property is open to the general public alone is not enough to permit the exercise of rights under section 7 of the Act on the property. Instead, the court noted it had earlier held property rights need yield "only in the context of an organization campaign" and then only to the extent necessary to facilitate the exercise of employees' section 7 rights (*Central Hardware Company* v. *N. L. R. B., supra,* 407 U. S. 539, 544-545 [92 S. Ct. 2238, 2242]). The court held it was error for the NLRB and Court

of Appeals to allow the picketing on the owner's property simply because it was open to the public, etc., before the property had to some significant degree the functional attributes of property devoted to public use, private owner's rights prevail (*Central Hardware Company* v. *N. L. R. B., supra,* 407 U. S. 539, 547 [92 S. Ct. 2238, 2243]). The court remanded the matter for a determination whether there was substantial evidence to support the NLRB examiner's conclusion no reasonable means of communication with employees was available to the nonemployee union organizers other than solicitation in the privately owned shopping area's parking lot.

While the *Central Hardware* case did not deal with the specific question of state intrusion upon NLRB jurisdiction as we do here it nevertheless recognized protected activities under the Act can be effectively carried out and not thwarted while at the same time protecting property owner's rights guaranteed by the Fifth and Fourteenth Amendments. From the fact an accommodation was reached between private property owner's rights—allowing use of available law of trespass to protect their interest—and union's rights—permitting them a reasonable means of communication—its decision must be viewed as protecting deeply rooted rights of property owners without interfering with the primary competence of the NLRB. The *Central Hardware* decision aids us in resolving the question whether traditional protective actions by states on behalf of real property owner's interests are infringements on the primary competence of the NLRB in matters actually or arguably protected or prohibited under the Act. A principle reasonably to be taken from *Central Hardware* is that so long as the preservation of the traditional concepts of rights inherent in property ownership do not interfere with or alter the effective communication by the union of its point of view, the property owner's rights in his property should be preserved.

This view finds further support in *Amal. Food Emp. U. Loc. 590* v. *Logan Val. Plaza* (1968), 391 U. S. 308 [88 S. Ct.

1601] which involved actual use of a state court injunction to protect private ownership by moving the location of union picketers asserting union rights against one of several business establishments to a location outside of the shopping center. The court did not base its decision invalidating the injunction on the ground the state injunctive process invaded NLRB jurisdiction. It said, however, had the state court relied on the purpose of the picketing and held it to be illegal, substantial questions of preemption under the federal labor laws would have been present (391 U. S. at p. 314, fn. 7 [88 S. Ct. at p. 1606, fn. 7]). Rather, it focused on the location of the picketers, not their purpose in terms of arguably protected or prohibited activities under the Act. It held the state could not use its trespass laws wholly to exclude from the shopping center members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put (391 U. S. at pp. 319-320 [88 S. Ct. at p. 1609]). The court's emphasis was on the ability of the picketers to communicate their ideas to their intended audience, not on any absence of state power to issue the injunction. Indeed, it framed the issue presented in terms of the state's "generally valid rules against trespass to private property." (*Amal. Food Emp. U. Loc. 590* v. *Logan Val. Plaza, supra,* 391 U. S. 308, 315 [88 S. Ct. 1601, 1607]). The case before us, like *Logan Valley Plaza,* concerns itself only with the location and not with the purpose of the picketing.

Where the issues of the labor dispute are not affected, and the ground rules between labor and management are not altered, the state courts are the most appropriate agency to enforce these traditional rights (see *Buxbom* v. *Smith, supra,* 23 Cal. 2d 535, 546). This is particularly so if NLRB jurisdiction has not been requested or assumed.

Our attention has been called to the California Supreme Court case of *Musicians Union, Local No. 6* v. *Superior Court*

(1968), 69 Cal. 2d 695. Decided before *Central Hardware* the court there considered a lower court injunction broadly stated to prohibit all picketing at the entrances or any portion of a publicly owned coliseum for any purpose related to the hiring of union musicians by a tenant. The injunctive order was held to be beyond the jurisdiction of the superior court under the *Garmon* rule relating to union activities which are arguably protected by the Act and the rule of *Russell* v. *Electrical Workers Local 569* (1966), 64 Cal. 2d 22, 23, 28-29.[11] The court also concluded the injunction could not be justified as an exercise of the power reserved to the states to ensure public health and safety. In connection with the latter point the court said: ". . . it is clear that a blanket application of the states' trespass laws to prohibit such picketing 'would tend to frustrate uniform application of federal labor legislation' . . . [t]he law of trespass . . . cannot frustrate the federal scheme." (*Musicians Union, Local No. 6* v. *Superior Court, supra,* 69 Cal. 2d 695, 711, 712.) The court then said:

> "There may be circumstances in which the use of trespass laws in labor controversies would reach activities that would have 'no relevance to the Board's function,' and the state's power to enjoin them would not interfere with the Board's jurisdiction over the merits of the labor controversy.' (*Linn* v. *Plant Guard Workers* (1966), 383 U.S. 53, 63-64 [15 L.Ed.2d 582, 590-591, 86 S.Ct. 657].) *In the present case, however, the injunction relies upon the law of trespass* not to ensure public safety and order, but *to institute ground rules governing the economic struggle* between the union and real parties in interest. *It does not prohibit trespassing in specified times and places to guarantee the orderly exhibition of the game.* Thus the injunction protects not the public welfare, but the private right of Coliseum to post its property against

11. The tenant (party against whom the union claimed a grievance) and the coliseum management had failed to demonstrate the NLRB in its discretion would decline to assert jurisdiction. The *Russell* case requires the party seeking relief in the state court to show NLRB would decline to assert jurisdiction.

> any designated entrant thereon. It is for the Board, however, to determine whether and how to protect a party against activities that the Act 'arguably' protects or prohibits. Indeed, the propriety of labor activity on private property has been a persistent issue in disputes before the Board (See Note, *supra,* 73 Harv.L.Rev. 1216, 1218), and the Board has the power in appropriate cases to authorize such activity. (See *Marshall Field & Co.* v. *N.L.R.B., supra,* 200 F.2d 375, 380; *N.L.R.B.* v. *Babcock & Wilcox Co., supra,* 351 U.S. 105, 111-112 [100 L.Ed. 975, 982-983].) Consequently it is manifest that *petitioners' trespass upon Coliseum's property does not justify respondent court's exercise of its jurisdiction to prohibit peaceful activities 'arguably' protected or prohibited by federal law. . . .*" (Emphasis added.) (*Musicians Union, Local No. 6* v. *Superior Court, supra,* 69 Cal. 2d 695, 712.)

Significant is the opening sentence where the court indicated an injunction would be appropriate if the activities enjoined "had no relevance to the Board's function" and the "injunction would not interfere with the Board's jurisdiction over the merits of the labor controversy." The broad nature of the injunction there, totally prohibiting picketing, made a significant invasion into NLRB authority and the labor issues and exceeded the jurisdiction of the state court.

The *Musicians Union, Local No. 6* case makes the issue abundantly clear by way of contrast. In the case at bar the injunction is carefully worded to avoid interfering with the labor issues and preserve the forces the respective parties may bring to bear. It simply moves the situs of the controversy off the private property. It did not interfere with the ability of the parties to carry on the controversy with or without NLRB involvement. The trial court's order was narrowly confined to the "location" of the controversy as opposed to the purpose of the acts (see *Amal. Food Emp. U. Loc. 590* v. *Logan Val. Plaza, supra,* 391 U. S. 308, 313, 314 [88 S. Ct. 1601, 1606]) and did not deny the Union effective communication with all persons going to Sears.

Under *Central Hardware*, with its recognition an accommodation is necessary between the exercise of private property and protected union activity rights, it seems apparent the United States Supreme Court does not view the making of an appropriate accommodation as a frustration of the federal scheme under the Act. No doubt the United States Supreme Court would agree, as we do, blanket application of trespass law as the lower court applied in the *Musicians Union, Local No. 6* case would tend to frustrate the federal scheme by impairing the primary competence of the NLRB. In the *Central Hardware* case, moreover, the United States Supreme Court has, as the State Supreme Court did in the *Musicians Union, Local No. 6* case, evidenced the view that circumstances may present themselves in which the use of trespass laws in labor controversies reaches activities having no relevance to the functions of NLRB and an exercise of state power to enjoin these activities would not interfere with NLRB jurisdiction over the merits of the labor controversy or the rights of the parties in asserting their respective economic pressure against the adversary. This is the case before us, for an appropriate accommodation has been made to assure effective communication of labor's view while at the same time protecting traditional rights of private property owners. Unlike the *Musicians Union, Local No. 6* case, the injunction here does not establish different ground rules which have any governing effect on the economic struggle between employer and Union; it is limited in scope only moving the arena of the controversy to the public property; in no way can it be viewed as an exercise of jurisdiction "to *prohibit* peaceful activities 'arguably' protected or prohibited by federal law." (Emphasis added.) *Musicians Union, Local No. 6* v. *Superior Court, supra,* 69 Cal. 2d 965, 712.)

While not essential to the application of the *Garmon* rule it is appropriate to note no effort was made to bring the matter within the Board's jurisdiction.[12]

12. See Justice Harlan's memorandum opinion in *Taggart* v. *Weinacker's Inc., supra,* 397 U. S. 223, 230 [90 S. Ct. 876, 879],

(Continued on next page)

The Union next contends the First Amendment to the United States Constitution guarantees the right to picket Sears' premises. It relies generally on *Amal. Food Emp. U. Loc. 590* v. *Logan Val. Plaza, supra,* 391 U. S. 308, 313 [88 S. Ct. 1601, 1605], and a line of cited cases holding peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of picketing, protected by the First Amendment. The fact that the property upon which the picketing occurs is private does not necessarily preclude asserting the constitutional right of free speech if the property is treated as public property (*Marsh* v. *State of Alabama* (1946), 326 U. S. 501 [66 S. Ct. 276]).[13] In *Logan Valley Plaza* the court held a shopping center complex with numerous tenants and streets and walkways had sufficient characteristics of a public municipal facility to permit picketing directly related in its purpose to the use to which the shopping center property was being put.[14]

(Continued from preceding page)

in which the Justice recognizes concern over the hiatus created when the NLRB does not or cannot assert its jurisdiction and the "arguably protected" rule of the *Garmon* case leaves the employer in the position of using self-help or provoking the union to charge the employer with an unfair labor practice (see also Justice White's concurring opinion in *International Longshore, Local 1416* v. *Ariadne Shipping Co.* (1970), 397 U. S. 195, 201-202 [90 S. Ct. 872, 875]. The problem is also discussed in Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon,* 56 Va. L. R. 1435, 1437-1438.

13. In *Marsh* v. *State of Alabama, supra,* 326 U. S. 501 [66 S. Ct. 276], the Jehovah's Witnesses were allowed to distribute religious literature on the streets of a "company town" because the property, though privately owned by Gulf Shipbuilding Corporation, had all the outward appearances of any other town including streets and walkways open to the public with nothing to distinguish them as private property. The owner also assumed the functions of a municipal government.

14. *In re Lane* (1969), 71 Cal. 2d 872, follows the *Logan Valley Plaza* holding. It was not a labor management dispute with the picketed store but rather the picketers were protesting the store's advertising in a newspaper engaged in a union dispute. It did, however, involve a single store with parking lot much as is present in Sears' case. The Court balanced the interests and, finding the public sidewalk hazardous, upheld the right to picket on private property.

After the decision in *Logan Valley Plaza*, however, its apparently broad holding as to the scope of the constitutional right to exercise First and Fourteenth Amendment rights on property generally open to the public has been somewhat limited as it applies to privately-owned property. In *Lloyd Corporation, Ltd.* v. *Tanner* (1972), 407 U. S. 551, 562 [92 S. Ct. 2219, 2225], the court points out that *Logan Valley Plaza* extended the *Marsh* rule to a shopping center complex only in the context where the picketing activity directly related to the shopping center activities *"and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available."* (Emphasis added.) (*Lloyd Corporation, Ltd.* v. *Tanner, supra,* 407 U. S. 551, 563 [92 S. Ct. 2219, 2226].) In denying the respondents the right to pass out handbills (not a labor management dispute) the court rejected the argument that since the center is open to the public, the private owner cannot enforce restrictions against handbills on the premises. It stated such an argument misapprehends the scope of the invitation extended to the public which is to come to the center to do business.

On the heels of this decision was *Central Hardware Company* v. *N. L. R. B., supra,* 407 U. S. 539 [92 S. Ct. 2238], a case which did involve a union dispute. Here the Supreme Court reiterated the limitation on the *Logan Valley Plaza* case, saying:

> "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes. The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are 'open to the public.' Such an argument could be made with respect to almost every

> retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." (*Central Hardware Company* v. *N. L. R. B., supra,* 407 U. S. at 547 [92 S. Ct. at 2243].)

The facts in the instant case, like those in *Central Hardware*, did not provide the court with adequate reasons for turning its back on the rights of the property owner. As in *Central Hardware*, we do not have a shopping center complex but a privately-operated single store. The Union's right to picket was not denied nor was there an unreasonable restriction on its right to communicate with the general public. The position of the pickets on the sidewalk was not any more hazardous[15] and was just as effective. Union sympathizers did see and honor the lines. There was no showing any confusion existed as to the object of the Union's attack since the pickets at the parking lot entrance could communicate with all the persons dealing with Sears whose patrons were the only ones using the parking lot. We find the *Central Hardware* case to be controlling. There is nothing in the facts presented here to suggest in the balancing of respective interests the property owner *must* yield to the Union. (See also *Diamond* v. *Bland* (1974), 11 Cal. 3d 331, 334.)

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15. The case before us differs substantially from *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers' Union* (1964), 61 Cal. 2d 766, relied on by the Union, in that the picketing on nearby public streets or sidewalks would entail the danger of traffic tie-up confusion as to the object of the picketing, and would impose the requirements of larger signs and more pickets. *Schwartz-Torrance* involved a shopping center complex and the principal target of the picketing was a single store within the complex. The court balanced the respective rights of the private property owner and the union, and concluded the union's interest in picketing outweighed a theoretical invasion of the right to exclusive control by the shopping center owner. See also *In re Lane, supra,* 71 Cal. 2d 872, 877, where "difficulties and hazards" to those exercising their First Amendment privileges existed (but *cf. Central Hardware Company* v. *N. L. R. B., supra,* 407 U. S. 539, 547 [92 S. Ct. 2238, 2243] and *N. L. R. B.* v. *Babcock & Wilcox Co.* (1956), 351 U. S. 105, 112 [76 S. Ct. 679, 684]).

The Union finally contends California law proscribes the issuance of injunctions for Union activity, relying on *Petri Cleaners, Inc.* v. *Automotive Employees, etc., Local No. 88* (1960), 53 Cal. 2d 455, and *Messner* v. *Journeymen Barbers etc. International Union* (1960), 53 Cal. 2d 873. No one disputes the right of the Union to employ picketing reasonably related to lawful objectives but neither of the cases cited involves the issue of Union activity on private property. Nor is Penal Code section 552.1[16] which is applicable only to posted industrial property,[17] a proscription on the issuance of an injunction in this case which involves commercial property used for retail sales.

Judgment affirmed.

Certified for Publication. /s/ COLOGNE *J.*

We Concur:

/s/ AULT
Acting P. J.

/s/ COUGHLIN
*J.**

16. Penal Code section 552.1 reads in part as follows:

"This article does not prohibit:

"(a) Any lawful activity for the purpose of engaging in any organizational effort on behalf of any labor union, agent, or member thereof, or of any employee group, or any member thereof, employed or formerly employed in any place of business or manufacturing establishment described in this article, or for the purpose of carrying on the lawful activities of labor unions, or members thereof.

". . . ."

17. Article 1 preceding Penal Code section552.1 is entitled Trespassing or Loitering near Posted Industrial Property, and the property subject of the article is defined in section 554 as including property used in petroleum, gas, electricity, telephone, water, explosive or rail facilities. (See also *Cotton* v. *Superior Court* (1961), 56 Cal. 2d 459, 463.)

* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SEARS ROEBUCK & COMPANY, *Plaintiff and Respondent,* *vs.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, *Defendant and Appellant.*	L. A. 30562 Super. Ct. No. 347511

Defendant San Diego County District Council of Carpenters (Union) appeals from an order granting a preliminary injunction restraining defendant, its officers, agents, representatives and members from picketing on the property of plaintiff Sears, Roebuck & Company (Sears), but permitting them to picket on the public sidewalks adjacent to Sears' private property.

Sears operates a retail department store on property which it owns in Chula Vista, San Diego County. The store building itself is centered on the large, rectangular-shaped piece of land. Walkways abut on the building on all four sides; these in turn are surrounded by a large parking area. All of the walkways and the entire parking area are located on Sears property which on its external limits is bounded on three sides by public sidewalks and streets, and on the fourth by private residences separated from the store property by a concrete wall. Sears' store is the only building on the premises.

Defendant Union is a labor organization created for the purpose of negotiating terms and conditions of employment on behalf of certain employees in the carpentry trades.

In October 1973, the Union was informed by one of its members that Sears was having carpentry work done in its

Chula Vista store. On October 24 two business representatives of the Union visited the store and determined that platforms and other wooden structures were being built by carpenters who had not been dispatched from the Union's hiring hall, that the work was covered by the master agreement between the Union and the Building Trades Council of San Diego County and that the men engaged in it came within the classification of journeymen carpenters. Later the same day representatives of the Union met with Sears' store manager and requested that Sears either contract the work through a building trades contractor who would use dispatched carpenters, or in the alternative, sign a short form agreement obligating Sears to abide by the terms of the Union's master labor agreement with respect to the dispatch and use of carpenters on the job. The manager indicated that he would consider the matter, but despite repeated inquiries by the Union, he never responded.

On the morning of October 26, the Union established picket lines on plaintiff's property. Pickets patrolled on the parking lot areas immediately adjacent to the walkways abutting the sides of the building. They carried signs indicating that they were AFL-CIO pickets sanctioned by the "Carpenters' Trade Union." It is not disputed that at all times while they were on Sears' property the pickets conducted themselves in a peaceful and orderly fashion. The record discloses no acts of violence, threats of violence, or obstruction of traffic. The security manager of the store requested that the pickets be removed from Sears' private property, but the Union's business representative refused, stating that the pickets would not leave unless compelled to do so by legal action.

On October 29, Sears obtained a temporary restraining order enjoining the Union, its agents, representatives and members from picketing on Sears' property. The Union complied by removing its pickets to the public sidewalks adjacent to, but outside of, the property. Sears claimed that while the Union was picketing on the public sidewalks, certain deliverymen and repairmen

refused to cross the picket-lines to service the Sears store. The Union, on the other hand, asserted that its pickets on the public sidewalks were ineffective because they were too far away from the store. As a result, on November 12, 1973, the Union moved its pickets allegedly because of their ineffectiveness. The pickets never returned.

On November 21, 1973, the superior court granted a preliminary injunction restraining the Union, its officers, agents, representatives and members from "causing, instigating, furthering, participating in, or carrying on picketing on the plaintiff's property. . . ." The court expressly declared, however, that "this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, 'H' Street and 'I' Street which are adjacent to the private property of plaintiff." This appeal followed.

Although the Union launches several related attacks on the trial court's injunction, essentially its main contention is that the court did not have the subject matter jurisdiction of the underlying labor dispute and thus was devoid of all judicial power to enjoin the picketing. We are satisfied that this contention has merit. We shall point out that federal law preempts both state and federal court jurisdiction of the controversy at hand, that such law confers exclusive jurisdiction on the National Labor Relations Board (Board) and that to such rule of preemption there is no exception permitting state courts to exercise jurisdiction over peaceful labor activity merely because it involves trespass on private property. Accordingly we reverse the order granting the injunction.

As we have already had occasion to explain in detail (see Musicians Union, Local No. 6 v. Superior Court (1968), 69 Cal. 2d 695) the Labor Management Relations Act (Act), whose purpose is "to promote the full flow of commerce . . . and to protect the rights of the public in connection with labor disputes affecting commerce," (29 U. S. C. A. § 141) empowers the Board "to prevent any person from engaging in any unfair

labor practice . . . affecting commerce." (29 U. S. C. A. § 160(a).) "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." (29 U. S. C. A. § 152(9).) "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States. . . ." (29 U. S. C. A. § 152(6).) "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (29 U. S. C. A. § 152(7).) In the matter before us, we observe that the parties do not call into question the fact that the underlying controversy is a labor dispute "affecting commerce" and thus within the compass of the foregoing statutory definitions establishing the jurisdiction of the Board. Nor does Sears contend that the Board in its discretion would decline to assert jurisdiction over the dispute and that as a result the superior court had jurisdiction pursuant to the provisions of section 14(c) of the Act. (29 U. S. C. A. § 164(c).)[1]

Having satisfied ourselves that Sears was a statutory employer subject to the Act, we turn to consider the two sections having a crucial impact on the jurisdictional issue before us.

1. Defendant Union, relying upon our decision in *Russell* v. *Electrical Worker Local 569* (1966), 64 Cal. 2d 22, argues that Sears' failure to demonstrate that the Board would decline to assert jurisdiction over this dispute precludes the assumption of jurisdiction by the superior court. The Union misconstrues *Russell*. Under that decision, the party seeking relief in the superior court bears the burden of establishing the Board's refusal to assert jurisdiction only in those instances where it is claimed that the state court has jurisdiction pursuant to the grant of residual jurisdiction in section 14 (c) of the Act. As will be explained, *infra*, Sears contends that notwithstanding the Board's jurisdiction, the superior court had jurisdiction to issue its injunction by virtue of a judicially created exception to the rule of preemption; Sears does not claim the benefit of the statutory exception in section 14(c).

Section 7 of the Act provides that "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . . ." (29 U. S. C. A. § 157.) Section 8 defines activities which constitute unfair labor practices. (29 U. S. C. A. § 158.) It is now settled law that "When an activity is arguably subject to [section] 7 or [section] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the [Board] if the danger of state interference with national policy is to be averted." (San Diego Bldg. Trades Council v. Garmon (1959) 359 U. S. 236, 245; see Musicians Union, Local No. 6 v. Superior Court, *supra*, 69 Cal. 2d 695, 706.) *Garmon* "established the general principle that the [Act] pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act." (Motor Coach Employees v. Lockridge (1971) 403 U. S. 274, 276.) We therefore proceed to determine whether the activities enjoined in the instant case are "arguably" protected by section 7 or "arguably" prohibited by section 8 of the Act.[2]

As the uncontradicted facts before us disclose, the Union, prior to instituting picketing, requested that Sears contract its work through a building trades contractor who would employ carpenters dispatched from Union's hiring hall or, in the alternative, sign an agreement with the Union by which Sears would be bound to hire through the Union's hiring hall at prevailing wage scales. These facts indicate that one of the Union's purposes in picketing the Sears store was to secure work for the Union's members. We have heretofore recognized that a labor union "seeking to broaden the employment opportunities for its members . . . pursue[s] an objective that section 7 'arguably' protects as an activity for the employees' 'mutual aid or protection.' . . .

2. In so doing, we are mindful of our earlier views to the effect that the adverb "arguably" as used in the above excerpt from *Carmon* means "susceptible of reasonable" argument. (See Grunwald-Marx, Inc. v. Los Angeles Joint Board (1959) 52 Cal. 2d 568, 584; see also Musicians Union, Local No. 6 v. Superior Court, *supra*, 69 Cal. 2d 695, 706, fn. 6.)

[¶] Moreover, picketing for employees' 'mutual aid or protection' is a classic form of 'concerted activities' within the meaning of section 7." (Musicians Union, Local No. 6 v. Superior Court, *supra*, 69 Cal. 2d 695, 707.) The record also reflects that the picketing was for the purpose of publicizing Sears' undercutting of prevailing standards for the employment of carpenters. In this additional respect, then, the Union's "peaceful primary picketing to protest wage rates below established area standards arguably constituted protected activity under [section] 7." (Longshoremen Local 1416 v. Ariadne Shipping Co. (1970) 397 U. S. 195, 200-201.)

These picketing activities of the Union were not disqualified for arguable protection under section 7 merely because they were engaged in upon Sears' private property and, being without Sears' permission or approval, were consequently of a trespassory nature. In NLRB v. Babcock & Wilcox Co. (1956) 351 U. S. 105, and Central Hardware Co. v. NLRB (1972) 407 U. S. 539, the Supreme Court established that in certain circumstances non-employee union representatives have a right protected under section 7 to enter the employer's premises. Undeniably this right is not all encompassing. A determination of its scope requires an "[a]ccommodation between [section 7 rights and private property rights] with as little destruction of one as is consistent with the maintenance of the other." (NLRB v. Babcock & Wilcox Co., *supra*, 351 U. S. at p. 112.) "The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." (Hudgens v. NLRB (1976) ..... U. S. .....*) Under the *Garmon* rule, so long as it can be argued that trespassory union activity is protected under section 7, it is initially within the exclusive competence of the Board to reconcile these section 7 rights with private property rights; state court jurisdiction is displaced. (See Cox, *Labor Law Preemption Revisited* (1972) 85 Harv. L. Rev.

* 44 U. S. L. Week 4281, 4286.

1337, 1360-1361; Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity* (1970) 83 Harv. L. Rev. 552, 562-563.)[3]

We also consider it "arguable" that the Union's activities constituted recognitional picketing subject to the provisions of section 8(b)(7)(C) of the Act: "(b) It shall be an unfair labor practice for a labor organization or its agents . . . (7) to picket or cause to be picketed . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . unless such labor organization is currently certified as the representative of such employees: . . . (C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing; . . . *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services." (29 U. S. C. A. § 158(b)(7)(C).)

3. The necessity for the NLRB to be the arbiter of whether concerted trespassory union activity is protected by section 7 was cogently explained by an assistant general counsel of the Board: "This is an area that clearly calls for the exercise of the Board's expertise and experience, requiring it to consider and weigh such factors as whether employees or outside organizers are involved; if the latter, the extent to which the property has been opened up to outsiders for purposes other than union organization; and the feasibility of utilizing other avenues of communication. To permit the state courts to make determinations of this delicate nature is likely to result in the state court finding unprotected, and then enjoining, activity that the Board would find was protected by section 7 of the [Act.] To invite such conflicts with respect to 'conduct so plainly within the central aims of federal regulation' can only result in impairing Congress' intention to obtain a uniform national labor policy." (Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon* (1970) 56 Va. L. Rev. 1435, 1443-1444; fns. omitted.)

The request by Union's business representative that Sears sign a short form agreement arguably indicates that a recognitional purpose underlay the picketing and belies a claim that the picketing was not subject to section 8(b)(7)(C) because it was solely for the purpose of publicizing that Sears was undercutting prevailing wage rates for the employment of carpenters. (See Yuba, Sutter & Colusa Counties Bldg. & Construction Trades Council (1971) 189 N. L. R. B. 450 [77 L. R. R. M. 1185]; Building & Construction Trades Council of Philadelphia (1964) 149 N. L. R. B. 1629 [58 L. R. R. M. 1001]; Plasterers' & Cement Masons' Local 44 (1963) 144 N. L. R. B. 1298 [54 L. R. R. M. 1237]; Painters Union, Local 130 (1962) 135 N. L. R. B. 876 [49 L. R. R. M. 1592]; see also generally Morris, The Developing Labor Law (1971) pp. 564-566, 568-573.) This recognitional objective brought Union's picketing within the ambit of the 30-day limitation in section 8(b)(7)(C) notwithstanding the facts that Sears had no employees whom Union sought to represent and that therefore a petition for representation election under section 9(c) would have been futile. (Samoff v. Building & Construction Council of Delaware (1974) 378 F. Supp. 261, 267; Local 542, Int'l Union of Oper. Engineers (1963) 142 N. L. R. B. 1132 [53 L. R. R. M. 1205], enforced *sub nom.* NLRB v. Local 542, Int'l Union of Oper. Engineers (3rd Cir. 1964) 331 F. 2d 99, cert. den. 379 U. S. 889.) As the Board declared in *Local 542:* "The primary purpose of Section 8(b)(7) is to limit the impact of recognitional or organizational picketing upon an employer or his employees, so that questions of representation may be settled by orderly processes and in accord with the free choice of employees. In our view, a holding here that a union can picket indefinitely to force an employer to sign a *prehire* contract would run contrary to the purposes of the section." (142 N. L. R. B. 1132; italics in original.) The Union was arguably not entitled to the benefit of the informational picketing proviso since it appears that the picketing had the effect of inducing "individual[s] employed by . . . other person[s] in the

course of [their] employment, not to pick up, deliver or transport any goods or not to perform any services." (29 U. S. C. A. § 158(b)(7)(C).)

Thus, had the picketing continued for 30 days without a petition for a representation election having been filed, Union would have arguably violated section 8(b)(7)(C). In addition to its remedy of bringing an unfair labor practice charge before the Board, Sears might also have been entitled to injunctive relief from a United States district court pursuant to section 10(*l*) of the Act. (29 U. S. C. A. § 160 (*l*); see *Samoff v. Building & Construction Council of Delaware, supra,* 378 F. Supp. 261, 265-266.)

In sum, our determination that the activities at issue herein are both arguably protected by section 7 and arguably prohibited by section 8 establishes a case for federal preemption. The Supreme Court has recognized, however, certain exceptions to the *Garmon* rule: "[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See International Assn. of Machinists v. Gonzales [1958], 356 U. S. 617. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.[2]" (San Diego Bldg. Trades Council v. Carmon, *supra,* 359 U. S. 236, 243-244.)[4] Sears contends that

"2. United Automobile Workers v. Russell [1958] 356 U. S. 634; Youngdahl v. Rainfair [1957] 355 U. S. 131; Auto Workers v. Wisconsin Board [1956] 351 U. S. 266; United Construction Workers v. Laburnum Corp. [1954] 347 U. S. 656."

4. In addition to the two judicial exceptions to preemption suggested in *Garmon* for matters of "peripheral concern" of the Act or for interests "deeply rooted in local feeling and responsibility,"

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the protection of private property from trespass is an interest "so deeply rooted in local feeling and responsibility" that the states may enjoin peaceful primary labor picketing.

The Supreme Court left open this question in Amalgamated Meat Cutters etc. Workmen v. Fairlawn Meats (1957), 353 U. S. 20,[5] and despite several opportunities (see Schwartz-

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there are statutory exceptions permitting a state court to exercise jurisdiction over activities arguably subject to section 7 or section 8 of the Act. We have referred above to section 14(c) of the Act (see fn. 1, *ante*, and accompanying text) which permits state courts to assume and assert jurisdiction over labor disputes where the NLRB has declined to assert jurisdiction by rule of decision or published rule because, in its opinion, "the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. . . ." 29 U. S. C. A. § 164(c).) In addition, under section 301(a) of the Act (29 U. S. C. A. § 185(a)) "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States. . . ." State courts have concurrent jurisdiction with the federal courts over suits brought under section 301 (a). (Charles Dowd Box Co. v. Courtney (1962) 368 U. S. 502.) Furthermore, a state court is not deprived of its jurisdiction over such a suit by the fact that the conduct complained of would constitute an unfair labor practice within the jurisdiction of the NLRB. (Smith v. Evening News Assn. (1962) 371 U. S. 195; Consolidated Theatres, Inc. v. Theatrical State Employees Union (1968), 69 Cal. 2d 713, 722.) Sears has not claimed that either of these statutory exceptions to NLRB preemption are applicable to the instant controversy.

5. We disagree with Sears' suggestion in its citation to this court of a recent decision of the New York Court of Appeals that the Supreme Court in *Fairlawn Meats* indicated that an injunction directed narrowly at trespassory conduct would not be preempted. (See People v. Bush (N.Y. Ct. App. Dock. No. 138, May 4, 1976) ..... N.Y. .....*) In *Fairlawn Meats* the Supreme Court overturned a state court injunction which prohibited various types of picketing for the purpose of compelling an employer to enter into a union-shop agreement. The Court determined that such picketing was "arguably" prohibited by section 8 (b)(2), and state jurisdiction to regulate such conduct was therefore preempted. One of the types of activity prohibited by the state injunction was trespassing

* Multilith opinion at page 7.

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Torrance Investment Corp. v. Bakery & Confectionery Workers' Union (1964) 61 Cal. 2d 766, cert. den. (1965) 380 U. S. 906; Taggart v. Weinacker's Inc. (1968) 283 Ala. 171, cert. granted (1969) 396 U. S. 813, cert. dism. (1970) 397 U. S. 223) has not yet explicitly answered it. This court, on the other hand, squarely confronted the issue in Musicians Union, Local No. 6 v. Superior Court, *supra*, 69 Cal. 2d 695. In the action underlying that proceeding for a writ of prohibition, the respondent superior court had enjoined the Musicians Union and others from picketing at the entrances to, or on any property of, the Oakland-Alameda County Coliseum Complex. The union was involved in a dispute with Charles O. Finley & Company, Inc., owner of the Oakland Athletics baseball team, over the number and type of musicians who would play at Athletics' home games. We held that the superior court was without jurisdiction to enjoin the union's "arguably" protected or prohibited activities. Noting that "a blanket application of the states' trespass laws to prohibit [peaceful picketing that the Act regulates] 'would tend to frustrate uniform application of federal labor legislation,' " (*id.* at p. 711; citations omitted) we rejected the contention that the court had jurisdiction to enjoin the union from trespassing upon the Coliseum property in the absence of some danger to public health or safety.

It is argued that our decision in *Musicians Union* should be distinguished from the instant case on the basis that in the former the superior court enjoined all picketing wherever it

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upon the plaintiff's property. In that regard, the Supreme Court stated: "Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort is a question that is not here. Here the unitary judgment of the Ohio court was based on the erroneous premise that it had power to reach the union's conduct in its entirety. Whether its conclusion as to the mere act of trespass would have been the same outside of the context of petitioner's other conduct we cannot know." (353 U. S. at pp. 24-25.) We have previously construed this language as leaving open the question which we decide today. (Musicians Union, Local No. 6 v. Superior Court, *supra*, 69 Cal. 2d 695, 711.)

might occur, while the injunction in this case prohibits only picketing upon Sears' private property. This argument clearly lacks merit. As indicated, we held in *Musicians Union* that the superior court was without jurisdiction to enjoin activities, both trespassory and non-trespassory, which were arguably protected or prohibited by the Act.

We recognize in *Musicians Union* that "[t]here may be circumstances in which the use of trespass laws in labor controversies would reach activities that would have 'no relevance to the Board's function,' and the state's power to enjoin them 'would not interfere with the Board's jurisdiction over the merits of the labor controversy.' " (69 Cal. 2d 695, 712, quoting from Linn v. Plant Guard Workers (1966), 383 U. S. 53, 63-64.) We also acknowledged that despite the *Garmon* rule, power was reserved to the states to prevent mass picketing, violence, threats of violence and obstructions to ingress and egress which threatened public health and safety. (69 Cal. 2d at p. 710.) In fact, the cases cited by the Supreme Court in support of its statement in *Garmon* that the states may regulate conduct which touches interests "deeply rooted in local feeling and responsibility" involved instances of mass picketing and threats of violence. (See text accompanying fn. 4, *ante*, and cases cited therein.) Nonetheless, the injunction issued in *Musicians Union* "relie[d] upon the law of trespass not to ensure public safety and order, but to institute ground rules governing the economic struggle between the union and [the employer]. It [did] not prohibit trespassing in specified times and places to guarantee the orderly exhibition of the game. Thus the injunction protect[ed] not the public welfare, but the private right of [the property owner] to post its property against any designated entrant thereon. It is for the Board, however, to determine whether and how to protect a party against activities that the Act 'arguably' protects or prohibits." (69 Cal. 2d at p. 712.) Similarly, the instant case involves no public health or safety consideration which would bring it within the heretofore recognized exceptions to federal preemption.

Notwithstanding our definitive holding in *Musicians Union* that labor picketing arguably subject to section 7 or 8 of the Act may not be enjoined by our courts merely for the reason that it constitutes a trespass on private property, Sears urges that we should be persuaded to the contrary by the concurring opinion of Chief Justice Burger in the subsequent case of Taggart v. Weinacker's Inc., *supra*, 283 Ala. 171, cert. granted 396 U. S. 813, cert. dism. 397 U. S. 223, 227 (Berger, C. J. concurring). In *Taggart* the Supreme Court dismissed its writ of certiorari as improvidently granted[6] after the Supreme Court of Alabama had held that its courts have jurisdiction to enjoin peaceful picketing on private property. While concurring in the court's dismissal, Chief Justice Burger expressed his view that the states are not preempted from enjoining trespassory peaceful picketing. He stated that "[t]he protection of private property . . . through trespass laws is historically a concern of state law" (*id.* at p. 227) and suggested that trespassory conduct touches interests "deeply rooted in local feeling and responsibility." In reaching this conclusion, Chief Justice Burger was particularly concerned with the hiatus in the law resulting from federal preemption where trespassory conduct is not prohibited by section 8 and is only "arguably" protected by section 7. In such instance the landowner has no remedy except to provoke the union into bringing unfair labor practice charges before the Board in order to obtain a determination whether the activity is actually protected. In Chief Justice Burger's view, "[n]othing in [*Garmon*] would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desires redress for illegal trespassory picketing." (*Id.* at p. 228.)

6. In its per curiam opinion, the court indicated that its dismissal was based on several factors. First, it appeared that only "a bare remnant of the original controversy" remained. Second, the record disclosed that the private sidewalk upon which picketing had occurred was narrow and the Alabama court had found obstructions to customers. The obscurity of the record on these latter issues rendered the case an inappropriate vehicle for deciding the First Amendment questions raised therein.

Nevertheless, in this area of federal preemption we are bound to follow the Supreme Court's most recent ruling. As we have indicated, the holding in *Garman* precludes state court jurisdiction over the labor dispute now before us. Notwithstanding the views of individual members of the high court, the fact remains that the court itself, speaking through a majority of its members, has not to this date created a judicial exception to its *Garmon* ruling so as to except from it and thus withdraw from the exclusive jurisdiction of the Board those peaceful activities—like the activities now engaging our attention—which, although arguably subject to section 7 or section 8 of the Act, are nevertheless trespassory in nature. Furthermore, we continue to believe that "[u]nlike the power to prevent violence and public disorder, the power to prohibit peaceful picketing that trespasses on the premises of employers involved in labor disputes would 'leave the States free to regulate conduct so plainly within the central aim of federal regulation. . . .' " (Musicians Union, Local No. 6 v. Superior Court, supra, 69 Cal. 2d at p. 711; citation omitted.) We say this mindful of the concern on the part of some members of the high court for the legal hiatus created by federal preemption where trespassory activity is merely "arguably" protected by section 7. In the case at bench, however, such a situation would have existed for a period of 30 days at most. At the end of that time, if the Union had not filed a petition for a representation election, it arguably would have been in violation of section 8(b)(7)(C) and Sears would have been entitled to the remedies discussed above.

Moreover, while the overbreadth of the "arguably protected" standard of preemption may on occasion deprive the landowner of a remedy for an actionable wrong, such incidents merely provide a basis for criticism of the *Garmon* rule itself.[7] (See Cox,

7. Mr. Justice White has on at least two occasions expressed a concern for the hiatus resulting from federal preemption of activities merely "arguably protected." (See Longshoremen Local 1416 v. Ariadne Shipping Co., *supra*, 397 U. S. 195, 201-202 (White, J. concurring); Motor Coach Employees v. Lockridge, *supra*, 403

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Labor Law Preemption Revisited, *supra*, 85 Harv. L. Rev. 1337, 1360-1367.) But the rule remains in effect and we are not free to declare that it is inoperative in the instant case. We therefore conclude that *Garmon* properly controls this case for the reasons set forth by Justice Harlan in his separate memorandum in Taggart v. Weinacker's Inc., *supra*, 397 U. S. 223, in which he responded to Chief Justice Burger: "While I recognize The Chief Justice's and Mr. Justice White's concern over the hiatus created when the Board does not or cannot assert its jurisdiction . . . that consideration is foreclosed, correctly in my view, by *Garmon*. Congress in the National Labor Relations Act erected a comprehensive regulatory structure and made the Board its chief superintendent in order to assure uniformity of application by an experienced agency. Where conduct is 'arguably protected,' diversity of decisions by state courts would subvert the uniformity Congress envisioned for the federal regulatory program. In the absence of any further expression from Congress I would stand by *Garmon* and foreclose state action with respect to 'arguably protected activities,' until the Board had acted, even if wrongs may occasionally go partially or wholly unredressed." (*Id.* at p. 230; citations omitted.)

Accordingly, we reaffirm our decision in *Musicians Union* and hold that the Union's trespass upon Sears' property did not justify the assumption of jurisdiction by the superior court to enjoin peaceful picketing "arguably" protected and prohibited

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U. S. 274, 325-332 (White, J. dissenting).) He advocates, however, not the creation of new exceptions to the *Garmon* rule, but a retreat from the doctrine itself. He "would hold that only labor activity determined to be actually, rather than arguably, protected under federal law should be immune from state judicial control." (*Longshoremen*, *supra*, at p. 202.) He "would permit the state court to entertain the action and if the union defends on the ground that its conduct is protected by federal law, to pass on that claim at the outset of the proceeding. If the federal law immunizes the challenged union action, the case is terminated; but if not, the case is adjudicated under state law." (*Motor Coach Employees*, *supra*, at p. 332.) This position has never commanded the support of a majority of the members of the court. (*Id.* at p. 290.)

by federal law.[8] The injunction must therefore be struck down. In view of the foregoing conclusion, we need not consider the Union's contention that its picketing was a constitutionally protected exercise of First Amendment rights.[9]

The order granting a preliminary injunction is reversed.

SULLIVAN, *J.*

We Concur:

WRIGHT, *C.J.*
MCCOMB, *J.*
TOBRINER, *J.*
MOSK, *J.*
CLARK, *J.*
RICHARDSON, *J.*

8. We have previously indicated our rejection of contrary decisions by the courts of Illinois and Wisconsin. (Musicians Union, Local No. 6 v. Superior Court, *supra,* 60 Cal. 2d at p. 712, fn. 8.) We find equally unpersuasive the decisions of our sister states in People v. Bush, *supra* (N. Y. Ct. App. Dock. No. 138, May 4, 1976) ..... N. Y. .....; Taggart v. Weinacker's Inc., *supra,* 283 Ala. 171, and Hood v. Stafford (1964) 213 Tenn. 684, 694-695 [378 S. W. 2d 766, 771].

9. We also note that while the instant case was pending in this court, the Supreme Court in Hudgens v. NLRB, *supra,* ..... U. S. .....,* overruled Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc. (1968) 391 U. S. 308—a case upon which the Union relies for its argument that its picketing was protected by the First Amendment. In view of the fact that the parties have not had an adequate opportunity to brief or argue the effect of *Hudgens* upon the instant controversy, it would be particularly inappropriate for this court to render a decision on this question at this time.

* 44 U. S. L. Week 4281.

APPENDIX F

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.* (the "Act") and the California Penal Code (1970) are set forth below:

NATIONAL LABOR RELATIONS ACT

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * *

CALIFORNIA PENAL CODE

§ 602. Trespasses constituting misdemeanors; enumeration

Every person who wilfully commits a trespass by any of the following acts is guilty of a misdemeanor: * * *

(k) Posted lands. Entering any lands under cultivation or enclosed by fence, belonging to, or occupied by, another, or entering upon uncultivated or unenclosed lands where signs forbidding trespass are dis-

played at intervals not less than three to the mile along all exterior boundaries and at all roads and trails entering such lands without the written permission of the owner of such land, his agent or of the person in lawful possession, and

(1) Refusing or failing to leave such lands immediately upon being requested by the owner of such land, his agent or by the person in lawful possession to leave such lands, or

(2) Tearing down, mutilating, or destroying any sign, signboard, or notice forbidding trespass or hunting on such lands, or

(3) Removing, injuring, unlocking, or tampering with any lock on any gate on or leading into such lands, or

(4) Discharging any firearm.

(1) Occupation. Entering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof.